In the Matter of Merchant Mariner's Document No. Z-389480-D1 and all other Seaman Documents

Issued to: JOHN REAL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1098

JOHN REAL

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.11-1.

By order dated 4 October 1957, an Examiner of the United States Coast Guard at New York, New York revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction of a narcotic drug law violation". The specification alleges that, on or about 6 September 1957, Appellant was convicted in the United States District Court for the Southern District of New York, a court of record, for violation of 18 U.S.Code 1407, a narcotic drug law of the United States.

At the hearing, Appellant was represented by Louis Friedman, Esquire, and entered a plea of not guilty to the charge and specification. The Investigating Officer introduced in evidence documents showing that Appellant was convicted as alleged. Appellant testified under oath in his defense. He admitted the conviction for violation of 18 U.S. Code 1407 but counsel argued that this was not a narcotics violation.

At the conclusion of the hearing, the Examiner rendered his decision in which he concluded that the charge and specification had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served on 4 October 1957. Notice of appeal was timely filed but the processing of this case has been delayed awaiting receipt of Appellant's brief.

FINDINGS OF FACT

On 6 September 1957, Appellant was represented by counsel when he was convicted after his plea of not guilty before the United States District Court for the Southern District of New York. Appellant was charged with a violation of 18 U.S. Code 1407 for unlawfully and knowingly departing from the United States at New York City, on or about 21 February 1957, without having registered a 1939 narcotics conviction for importing opium in violation of 18 U.S.Code 173,174. Imposition of sentence was suspended and Appellant was placed on probation for eighteen months.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends, on the authority of Lambert v. State of California (1957), 355 U.S. 225, that there was a denial of due process because Appellant did not have actual or probable knowledge of the requirement in 18 U.S.Code 1407 to register his prior narcotics conviction.

Two additional points are raised in Appellant's brief: Point A. Congress did not intend to enact ex post facto legislation or that 46 U.S.C. 239b should apply to the later enacted 18 U.S.C. 1407. In any event, revocation for conviction of a narcotic drug law violation is permissive rather than mandatory under 46 U.S.C. 239b because this statute states that the Secretary of the Treasury "may", not "shall", revoke. Therefore, the Examiner was free to impose an order less than revocation.

Point B. The Examiner relied on 46 CFR 137.03-1 as the sole authority for his order of revocation. The wording of this regulation does not include within its meaning the violation of a registration statute such as 18 U.S.C. 1407 enacted to control drug traffic. This statute is not related to the Commandant's authority to regulate the safety of life and property at sea.

In conclusion, it is urged that the order of revocation should be reversed or, alternatively, that the case be remanded to the Examiner for action not inconsistent with the Commandant's decision on appeal.

Appearances on appeal: Standard, Weisberg, Harolds and Malament of New York City by Lester E. Fetell, Esquire, of Counsel.

OPINION

For the reasons stated below, the contentions raised on appeal are considered to be without merit. I am in full accord with the decision of the Examiner and his order of revocation will be affirmed.

Preliminarily, the contention will be disposed of that Lambert v. State of California, supra, is controlling herein because there is no showing that Appellant had actual or probable knowledge of the requirement in 18 U.S.C. 1407 to register his prior narcotics conviction.

First, this action is based solely on the proper proof of Appellant's conviction for violation of 18 U.S.C. 1407. So long as this conviction remains outstanding, there is no reason for reconsideration on the basis of a collateral attack on the conviction, questioning its propriety with respect to this issue of knowledge on the part of the Appellant.

Secondly, it is perfectly clear on the authority of three United States Courts of Appeals that the Lambert decision has no application to convictions for violation of 18 U.S.C. 1407. Palma v. United States (C.A. 5, 1958), 261 F. 2d 93, United States v. Juzwiak (C.A. 2, 1958), 258 F. 2d 844 and Reyes v. United States (C.A. 9, 1958), 258 F. 2d 774 distinguish the Lambert case and uphold convictions under 18 U.S.C. 1407 stating that lack of knowledge of the requirement to register is not material to such a conviction. There is no reported Court of Appeals case to the contrary. The Juzwiak case deals with the exact issue under consideration here - the departure of a merchant

seaman from the United States without registering as a narcotics law violator. The latter case states, relative to the wholly passive conduct involved in the Lambert case, that the violation of 18 U.S.C. 1407 is not the failure to register; the violation is the positive act of leaving or entering the United States without registering. Hence, there seems to be no room for any argument that merchant seamen may escape conviction by the courts upon a showing of lack of knowledge.

Point A.

There is no element of ex post facto application of legislation involved. See Commandant's Appeal Decision No. 954 for definition of ex post facto laws.

Since 18 U.S.C. 1407 is considered to be a narcotic drug law within the meaning of 46 U.S.C. 239b (see discussion infra under Point B), there is no apparent reason why the latter statute should not apply to a conviction under 18 U.S.C. 1407 simply because this statute became law at a later date than 46 U.S.C. 239b. Appellant has cited no authority to the contrary.

It is true that the Commandant is not compelled to institute action in all cases under 46 U.S.C. 239b. This law states that the Secretary of the Treasury "may take action, based on a hearing ... to revoke the seaman's document of . . . any person who . . . has been convicted in a court of record of a violation of the narcotic drug laws . . . " Title 46 CFR 137.01-5(b) refers to the delegation by the Secretary of the Treasury of his "functions" under 46 U.S.C. 239-b to the Commandant and the latter's further delegation to the examiners of the authority to "revoke" documents under this law. Hence, the Commandant "may" take action by instituting a hearing but the limited authority of the examiner is mandatory to "revoke" if the charge is proved at the hearing. This is emphasized by 46 CFR 137.04-10 which states that "the only order which an examiner may enter in cases brought under this act, when the case is proved, is one of revocation." Consequently, the Examiner could not impose any order other than revocation despite the use of the word "may" in the above quoted statute.

Point B

The Examiner did not rely on 46 CFR 137.03-1 as the authority for his order. In his decision, the Examiner mentioned the regulatory policy to revoke the documents of any seaman found guilty of a narcotics offense under 46 U.S.C. 239 which is a separate and distinct statute from 46 U.S.C. 239b. But in the next paragraph of the Examiner's decision, he specifically states that the revocation is based on the fact of Appellant's conviction on 6 September 1957.

Although 18 U.S.C. 1407 is a registration law in that it requires prior narcotics convictions to be registered when entering or departing from the United States, it was not by chance that it was place in the U. S. Code under a chapter titled "Narcotics." As stated by the Examiner, 18 U.S.C. 1407 is an integral part of a comprehensive piece of legislation enacted by Congress for the purpose of eradicating the vicious, illicit trafficking in narcotic drugs and marijuana and eliminating their illegal uses. 1956 U.S. Code Congressional and Administrative News 3274, 3280, 3309, 3315. This

legislation in the "Narcotic Control Act of 1956" which specifically designates, in Section 201, that the law in question shall be in Title 18 of the U.S. Code under a new Chapter 68 titled "Narcotics" and shall be section 1407. 70 Stat. 567, 572, 574; 1956 U.S. Code Congressional and Administrative News 3319, 3320. Since 18 U.S.C. 1407 appears under the heading of "Narcotics" by Act of Congress, it seems only proper to consider that it is a narcotic drug law within the meaning of 46 U.S.C. 239b which was enacted by the same legislative body.

When 46 U.S.C. 239b was enacted, Congress apparently felt that the violation of any narcotic drug law was sufficiently related to the safety of life and property at sea to justify revocation of a seaman's documents. The later enactment of 18 U.S.C. 1407 to assist in controlling narcotic traffic and use is consistent with my belief that the surveillance of all persons, who are convicted narcotic offenders and are permitted to leave and return to this country, serves as a protective measure with respect to the potential danger which is created by the employment of such persons as seamen on merchant vessels of the United States. In order to maintain this close supervision over the crews of ships, narcotic offenders must be earmarked as a matter of record which is readily available for use by Government law enforcement officials. When this objective is thwarted by the failure of seamen to register, safety at sea becomes involved because of the absence of the deterrent effect such registration has, on previously convicted seamen, relative to their conduct on board ship with respect to any involvement with narcotics. This is so regardless of whether the seaman was an employee or passenger at the time of his violation of 18 U.S.C. 1407.

CONCLUSION

Based on the above factors, it is my opinion that there is no sound reason why the order of revocation should be reversed as requested by Appellant. Obviously, it would serve no purpose to remand the case to the Examiner since the determinations herein are not inconsistent with his initial decision.

However, clemency will be granted to the extent that Appellant may make application to the Commandant (MVP) for a new document at this time without waiting for the usual three-year period after the revocation of 4 October 1957. There is no assurance that the action taken on such application will be favorable to Appellant.

ORDER

The order of the Examiner dated at New York, New York, on 4 October 1957, is AFFIRMED.

J.A. Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 26th day of May, 1959.